UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - DETROIT

FENF, LLC,	)	Civil Action No. 2:17-cv-11810
	)	
	)	
Plaintiff,	)	Honorable
	)	
v.	)	Magistrate Judge
	)	
DANIEL JUNG and ANDREW JUNG, individuals, d/b/a CHIROPLAX,	)	
	)	**JURY TRIAL DEMANDED**
Defendants.	)	
	)	

COMPLAINT

Plaintiff FenF, LLC ("Plaintiff" or "FenF"), by and through its undersigned attorneys, alleges the following for its Complaint against Defendants Daniel Jung and Andrew Jung, individuals, d/b/a Chiroplax ("Defendants" or "Chiroplax"):

Parties

1. FenF is a limited liability company organized and existing under the laws of the state of Michigan and having a place of business located at 8155 Huron River Drive, Dexter, Michigan 48130.

2. On information and belief, Defendants are both residents of the State of Washington.

3. On information and belief, Andrew Jung resides or does business at 3859 S. 316th St., Auburn, Washington 98001.

4. On information and belief, Daniel Jung resides or does business at 400 NW Gilman Blvd., No. 719, Issaquah, Washington 98027.

5. On information and belief, Defendants do business under the name Chiroplax.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1121, because this action arises under the federal trademark and unfair competition laws of the United States, Title 15 Chapter 22 of the United States Code.

7. This Court has personal jurisdiction over Defendants because Defendants have conducted and continue to conduct business in this judicial district and, on information and belief, have engaged in activities related to FenF's claims of unfair competition and federal trademark infringement that establish minimum contacts with the State of Michigan, including having committed acts of federal unfair competition and federal trademark infringement in this judicial district, and the exercise of personal jurisdiction over Defendants is reasonable and fair. Personal jurisdiction over Defendants may be established under Fed.R.Civ.P. 4(k)(1)(A) and/or Fed.R.Civ.P. 4(k)(2).

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391.

Common Allegations

9. FenF sells foot-therapy products under the registered trademark YogaToes® and Yoga Toes® that are designed to treat various foot and toe ailments including hammertoes, flat feet, bunions, poor circulation, plantar fasciitis, and crossed toes.

10. FenF sells its YogaToes® and Yoga Toes® foot-therapy products on-line through its website (www.yogapro.com) as well as through other on-line retailers such as amazon.com.

11. FenF's YogaToes® and Yoga Toes® products are and, at times, have been, the number 1 seller in their product category on amazon.com.

12. The YogaToes® and Yoga Toes® products sold by FenF have a source indicating blue color. Representative photographs of the YogaToes® and Yoga Toes® products are attached to this Complaint as Exhibit A.

13. At all relevant times since at least December 10, 2002, FenF has been using the trade names YogaToes® and Yoga Toes®, as well as the blue color for its products in interstate commerce in connection with advertising, marketing, promoting, and selling its products.

14. FenF has acquired value, name and brand recognition, and goodwill in the YogaToes® and Yoga Toes® marks as a result of continual and substantial

advertising, promotion, and interstate commercial activity related to its YogaToes® and Yoga Toes® products.

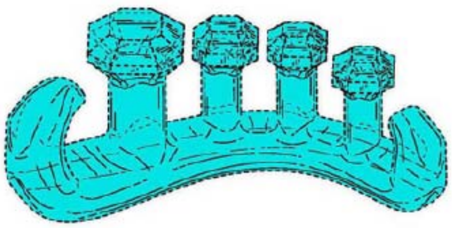
15. FenF has acquired value, brand recognition, and goodwill in its blue color trade dress as a result of continual and substantial advertising, promotion, and interstate commercial activity related to its YogaToes® and Yoga Toes® products.

16. FenF is the owner by assignment of United States Trademark Registration No. 3,253,636 ("the '636 registration") for the mark YOGA TOES and has the right to bring a cause of action for infringement of a federally registered trademark. The YOGA TOES mark was registered on June 19, 2007. A true and correct copy of the '636 registration is attached to this Complaint as Exhibit B.

17. FenF is the owner by assignment of United States Trademark Registration No. 3,430,215 ("the '215 registration") for the mark "YOGATOES" and has the right to bring a cause of action for infringement of a federally registered trademark. The "YOGATOES" mark was registered on May 20, 2008. A true and correct copy of the '215 registration is attached to this Complaint as Exhibit C.

18. Each of the '636 registration and the '215 registration has become incontestable under 15 U.S.C. § 1065.

19. FenF is the owner of United States Trademark Registration No. 5,099,070 ("the '070 registration") for the mark



and has the right to bring a cause of action for infringement of a federally registered trademark. The blue trade dress mark was registered on December 13, 2016. A true and correct copy of the '070 registration is attached to this Complaint as Exhibit D.

20. FenF has acquired value, name and brand recognition, and goodwill in the federally registered "YOGA TOES," "YOGATOES," and blue trade dress marks as a result of continual and substantial advertising, promotion, and interstate commercial activity related to its YogaToes® products.

21. Defendants sell gel toe stretchers in various colors, including a semi-transparent blue color which is likely to cause confusion with Plaintiff's mark for the color blue in connection with toe stretchers.

22. Defendants operate an interactive website at http://www.chiroplax.com where customers can purchase the Defendants' blue toe stretchers. An excerpt from the Chiroplax website is attached to this Complaint as Exhibit E.

23. Defendants applied for federal registration of the mark CHIROPLAX for use with "orthopedic cushions; orthopedic device to stretch and exercise the toes and feet; Orthopedic footwear" in international class 010, submitting a picture of

their blue toe stretchers as a specimen. A copy of the specimen for their trademark application serial no. 87/367,597 is attached to this Complaint as Exhibit F.

24. Defendants sell their toe stretchers through on-line retailers such as amazon.com. A screen shot from March 8, 2016 shows Defendants using "Yoga Toes" in their product title and also shows they were selling blue toe stretchers in a sub-window in addition to the lavender color. The screen shot is attached to this Complaint as Exhibit G.

25. On information and belief, after observing the commercial success that FenF's YogaToes® and Yoga Toes® products have enjoyed, Defendants began offering to sell and selling their toe stretchers.

26. Defendants' toe stretchers compete directly with FenF's YogaToes® and Yoga Toes® products for sales in the same relevant market to the same customer base.

Count I – Federal Trademark Infringement of the '636 Registration

27. FenF repeats and realleges the allegations continued in paragraphs 1 through 26 as if fully set forth herein.

28. Defendants have used in interstate commerce, without authorization from FenF, the mark "Yoga Toes" in connection with the marketing, advertising, promotion, and sale of their toe stretchers.

29. Defendants' use of the mark "Yoga Toes" is likely to have caused confusion, to have caused mistake, and/or to have deceived purchasers as to the source of Defendants' toe stretchers or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

30. Defendants' actions constitute infringement of FenF's federally registered trademark for YOGA TOES (the '636 registration) in violation of Section 32(a) of the Lanham Act, 15 U.S.C. § 1114.

31. Defendants' infringing conduct has caused damage to FenF's business, reputation, goodwill, profits, and the strength of FenF's federally registered YOGA TOES trademark.

32. On information and belief, Defendants were actively aware of FenF and its YOGA TOES federal trademark registration when they began selling their toe stretchers, yet proceeded anyway to use the mark YOGA TOES in connection with their toe stretchers, thus rendering Defendants' infringement willful and deliberate.

Count II – Federal Trademark Infringement of the '215 Registration

33. FenF repeats and realleges the allegations contained in paragraphs 1 through 32 as if fully set forth herein.

34. Defendants have used in interstate commerce, without authorization from FenF, the mark "Yoga Toes" in connection with the marketing, advertising, promotion, and sale of their toe stretchers.

35. Defendants' use of the mark "Yoga Toes" is likely to have caused confusion, to have caused mistake, and/or to have deceived purchasers as to the source of Defendants' toe stretchers or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

36. Defendants' actions constitute infringement of FenF's federally registered trademark for "YOGATOES" (the '215 registration) in violation of Section 32(a) of the Lanham Act, 15 U.S.C. § 1114.

37. Defendants' infringing conduct has caused damage to FenF's business, reputation, goodwill, profits, and the strength of FenF's federally registered "YOGATOES" trademark.

38. On information and belief, Defendant was actively aware of FenF and its "YOGATOES" federal trademark registration when they began selling their toe stretchers, yet proceeded anyway to use the mark YOGA TOES in connection with their toe stretchers, thus rendering Defendants' infringement willful and deliberate.

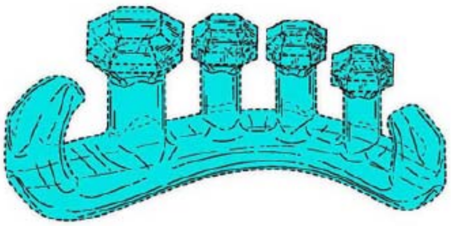
Count III – Federal Trademark Infringement of the '070 Registration

39. FenF repeats and realleges the allegations contained in paragraphs 1 through 38 as if fully set forth herein.

40. Defendants have used in interstate commerce, without authorization from FenF, blue trade dress in connection with the marketing, advertising, promotion, and sale of their toe stretchers.

41. Defendants' use of the blue trade dress in connection with their toe stretchers is likely to have caused confusion, to have caused mistake, and/or to have deceived purchasers as to the source of Defendants' toe stretchers or as to Defendants' affiliation, connection, approval, sponsorship, or association with FenF.

42. Defendants' actions constitute infringement of FenF's federally registered trademark for:



(the '070 registration) in violation of Section 32(a) of the Lanham Act, 15 U.S.C. § 1114.

43. Defendants' infringing conduct has caused damage to FenF's business, reputation, goodwill, profits, and the strength of FenF's federally registered blue trade dress mark.

44. On information and belief, Defendant was actively aware of FenF and its blue trade dress federal trademark registration when they began selling their toe stretchers, yet proceeded anyway to use the blue color in connection with their toe stretchers, thus rendering Defendants' infringement willful and deliberate.

Count IV – Federal Unfair Competition (False Designation of Origin or Sponsorship)

45. FenF repeats and realleges the allegations contained in paragraphs 1 through 44 as if fully set forth herein.

46. FenF's "YOGA TOES," "YOGATOES," and blue trade dress marks, which have been used in connection with YogaToes® and Yoga Toes® products since at least December 10, 2002, are inherently distinctive and have acquired secondary meaning through long and sustained use in interstate commerce and through substantial advertising, promotion, and sales.

47. Defendants have used “Yoga Toes,” and are continuing to use, in interstate commerce and without authorization from FenF, the blue trade dress mark in connection with the marketing, advertising, promotion, and sale of their toe stretchers.

48. Defendants’ use of the blue color and mark “Yoga Toes” is likely to cause confusion, to cause mistake, and/or to deceive purchasers as to the source of Defendants’ toe stretchers or as to Defendants’ affiliation, connection, approval, sponsorship, or association with FenF.

49. Defendants’ actions constitute false designation of origin and false representation in connection with the sale, distribution, and related interstate commercial activity of their toe stretchers in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125.

50. Defendants' unfair competition in connection with the use of the blue trade dress and mark "Yoga Toes" in interstate commerce has caused, is causing, and will continue to cause damage to FenF's business, reputation, goodwill, profits, and the strength of the "YOGA TOES," "YOGATOES," and blue trade dress marks.

51. On information and belief, Defendants were actively aware of FenF and its use of the "YOGA TOES," "YOGATOES," and blue trade dress marks when they began selling their toe stretchers, yet proceeded anyway to use the blue color and mark "Yoga Toes" in connection with their toe stretchers, and are continuing to sell blue toe stretchers, thus rendering Defendants' engagement in unfair competition willful and deliberate.

Count V – Common Law Trademark Infringement and Unfair Competition

52. FenF repeats and realleges the allegations contained in paragraphs 1 through 51 as if fully set forth herein.

53. Defendants have used in interstate commerce, without authorization from FenF, the mark "Yoga Toes" and a confusingly similar blue color in connection with the marketing, advertising, promotion, and sale of their toe stretchers.

54. Defendants' use of "Yoga Toes" and blue color is likely to cause confusion, to cause mistake, and/or to deceive as to the source of origin of Defendants' goods or services.

55. Defendants actions in the State of Michigan constitute trademark infringement and unfair competition under the Common Law of Michigan.

56. Plaintiff has been irreparably injured, and will continue to be irreparably injured unless the conduct of Defendants in the State of Michigan is preliminarily and permanently enjoined.

57. Upon information and belief, Defendants undertook the adoption of "Yoga Toes" and the blue color willfully or with reckless intention of trading upon the goodwill of Plaintiffs.

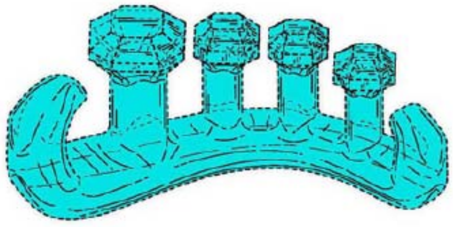
RELIEF REQUESTED

WHEREFORE, FenF respectfully requests that this Court enter a judgment that:

A. Finds Defendant has infringed FenF's federally registered trademark for "YOGA TOES" (the '636 registration) in violation of 15 U.S.C. § 1114;

B. Finds Defendant has infringed FenF's federally registered trademark for "YOGATOES" (the '215 registration) in violation of 15 U.S.C. § 1114;

C. Finds Defendant has infringed FenF's federally registered trademark for



(the '070 registration) in violation of 15 U.S.C. § 1114;

D. Orders Defendants to recall and surrender for destruction all products, advertisements, and other materials and uses constituting trademark infringement or unfair competition against Plaintiff's rights;

E. Orders Defendants and any affiliated officers, directors, agents, servants, employees, successors, assigns, and all persons in active concert or participation with them, be permanently enjoined from infringing FenF's federally registered "YOGA TOES," "YOGATOES," and blue trade dress trademarks;

F. Awards to FenF profits gained by Defendants as a result of Defendants' federal trademark infringement and federal unfair competition, increased to an amount this Court deems just, pursuant to 15 U.S.C. § 1117;

G. Awards to FenF actual damages sustained as a result of Defendants' federal trademark infringement and federal unfair competition, increased by up to three times, pursuant 15 U.S.C. § 1117;

H. Awards to FenF costs and any additional damages to which FenF is entitled as a result of Defendants' trademark infringement and unfair competition;

I. Declares this case exceptional and awards to FenF its reasonable attorney fees pursuant to 15 U.S.C. § 1117; and

J. Awards FenF costs, pre-judgment and post-judgment interest at the maximum allowable rate, fees, and other such further relief as the Court deems just and proper.

Respectfully submitted,

Dated: June 7, 2017

By: */s/ Richard W. Hoffmann*

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Attorneys for Plaintiff FenF, LLC

JURY TRIAL DEMANDED

FenF demands a jury trial on all issues so triable.

Respectfully submitted,

Dated: June 7, 2017

By: */s/ Richard W. Hoffmann*

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